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IN THE

Supreme Court of the United States

October Term, 1958

No. 625

CARL GANS and KATHERINE GANS,
Petitioners,

—v.—

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

CURTIS F. McCLANE,
% American Civil Liberties Union,
170 Fifth Avenue,
New York 10, New York.

DONALD J. LETT,
501-514 Richland Trust Building,
Mansfield, Ohio,

Counsel for Petitioners.

ROBERT K. RATH,
JACK G. DAY,
ROWLAND WATTS,
Of Counsel.

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STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Carl Gans and Katherine Gans pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Ohio, entered in the above entitled cases on the 9th day of July, 1958.

The Opinions Below

The opinion and dissenting opinion of the Supreme Court of Ohio (R. 229 *et seq.*) reversing the Court of Appeals, printed in Appendix B hereto, *infra* pp. 7a, *et seq.*, is reported in 168 Ohio State Reports 174, 151 N. E. (2d) 709 and 5 O.O. (2d) 472.

The opinion of the Court of Appeals, Third Appellate Judicial District of Ohio (R. 206 *et seq.*), is unreported and is printed in Appendix B hereto, pp. 23a, *et seq.*, *infra*.

Jurisdiction

The judgments of the Supreme Court of Ohio were entered on the 9th day of July 1958 (R. 218, 219) (Appendix B, pp. 22a, 23a, *infra*).

Timely application for rehearing, filed on July 22, 1958 (R. 218), was denied without opinion on October 8, 1958 (R. 218).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), since a right set up and claimed under the Constitution of the United States of America is drawn in question.

This right was first claimed and presented in the Application for Rehearing directed, seasonably, to the Supreme Court of Ohio. The opinion of that Court was one of first impression; its *ratio decidendi* came as a surprise, was not anticipated by the prosecution or the defense, and its holdings, in fact, provoked and raised for the first time the Federal issue and right herein asserted.

Questions Presented

Ohio Revised Code Sections 2151.02(A) through (E) (Appendix A, p. 1a, *infra*) enumerates five distinct acts or classes of conduct which constitute or determine one to be a "delinquent child."

Carl Gans and Katherine Gans were tried, by jury trial, and convicted on complaints charging them with tending to cause the delinquency of their eleven year old daughter (a ward of the Court) in that they did consent to said child securing a marriage license and misrepresenting her age. The trial court interpreted and charged the law of the applicable subsection upon which the complaints were predicated (O. R. C. Section 2151.02(E)) to be that only the court could grant consent to the marriage.

The proper Court of Appeals reversed the convictions (Appendix B, p. 25a, *infra*) but the Supreme Court of Ohio ruled that the convictions be affirmed, not on the basis of Subsection (E), but under Subsections (C) and (D) of O. R. C. Section 2151.02 as that entire section was instantly being interpreted by the Supreme Court.

The questions presented are:

(1) Were Carl and Katherine Gans, who were charged, tried and convicted under the provisions of Section 2151.02 (E) of the Ohio Revised Code, denied due process of law contrary to the Fourteenth Amendment by the circumstance that the Supreme Court of Ohio affirmed the convictions under the provisions of Section 2151.02(C) and (D) thereof, though conceding that there was no violation of Subdivision (E)?

(2) Where the petitioners are convicted on an instruction to the jury that only the court could grant consent to a marriage but a new and unexpected interpretation of the statute by the state Supreme Court holds that neither the parents nor the court could grant consent, and the convictions are affirmed by the said Supreme Court, based upon its new interpretation, are the petitioners denied a fair trial and due process of law in violation of the Fourteenth Amendment?

(3) Does a judicial determination that the continuing existence of a legal marriage will, *per se*, possibly and probably result in either (1) truancy by a minor female spouse, or (2) a tending to cause delinquency in others, constitute a valid basis for affirming a conviction of adults of the crime of "tending to cause delinquency"?

(4) Is the affirmance of a conviction in the highest state court valid where that court specifically rejects and denies both the basis for the conviction and the basis for the intermediate reversal thereof, but rationalizes its affirmance on a prognosis of the possible and probable future delin-

quent conduct of the minor child of the defendants-appellants by reason of their consent to an out-of-state marriage, where such prognosis is completely unsupported by the trial record?

Constitutional Provision Relied Upon

Petitioners rely upon the first section of the Fourteenth Amendment to the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

The statutory provisions involved are:

(1) (Page's) Ohio Revised Code, Section 2151.02, Vol. Title XXI, page 464;

(2) (Page's) Ohio Revised Code, Section 2151.41, Vol. Title XXI, page 491;

(3) (Page's) Ohio Revised Code, Section 3101.1, Vol. Title XXXI, page 1; and

(4) (Page's) Ohio Revised Code, Section 3101.04, Vol. Title XXXI, page 4.

The following statutory provisions, though not previously referred to or relied upon by any party to the cases, were also considered by the Supreme Court in its opinion:

(1) (Page's) Ohio Revised Code, Section 3321.01, Vol. Title XXXIII, page 176;

(2) (Page's) Ohio Revised Code, Section 3321.03, Vol. Title XXXIII, 1958 Supplement, page 117;

(3) (Page's) Ohio Revised Code, Section 3321.04, Vol. Title XXXIII, 1958 Supplement, page 117; and

(4) (Page's) Ohio Revised Code, Section 3321.22, Vol. Title XXXIII, page 184.

All of the above statutes are printed in Appendix A, pp. 1a, *et seq.*, *infra*.

Statement of the Case

A. Was the asserted Federal right timely raised?

Prior to the opinion and judgment of the Supreme Court, the history of these proceedings neither required, allowed or presented an opportunity or necessity for raising the questions herein set forth. Being in its controlling aspects an opinion of first impression in Ohio, the legal interpretations and holdings of the Court were unanticipated, came as a surprise and created the referent which gave rise to the questions. The Court did not cite in its opinion a single authority (case, treatise or otherwise) in support of its *ratio decidendi*.

Accordingly, the questions were suggested and raised initially in the application for rehearing directed to the Supreme Court (R. 245, *et seq.*) (Appendix C, p. 38, *infra*). Said application was denied without opinion October 8, 1958 (R. 218).

The opinion of the Supreme Court of Ohio holding that neither the parent, the court, nor any other entity can give consent to the marriage of a female under sixteen years of age (with one exception recognized by the court as not ap-

plicable) has no precedent in Ohio, is one of first impression and rendered the charge and instructions of the trial court, as given to the jury, absolutely erroneous in this regard.

The complaints and the convictions in the trial court, and the reversals in the Court of Appeals, in each instance, were formulated and predicated upon interpretations of Subdivision (E), Section 2151.02, Ohio Revised Code. Affirmance of the convictions by the Supreme Court predicated upon Subdivisions (C) and (D) of Section 2151.02 came as a surprise and chronologically and procedurally made impossible an earlier raising of the questions.

Where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right, the question is not raised too late if put forward for the first time upon a petition for rehearing. Objection could not be made in advance of the event.

Great Northern Railway Company v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 366-367; *Brinkerhoff-Farris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 678; *Missouri ex rel. Missouri Insurance Company* v. *Gehner*, 281 U. S. 313, 320.

B. Statement; Factual:

Carl Gans and Katherine Gans, the petitioners, are the parents of one Karlene Gans, and Carl Gans had been awarded the temporary custody and control of Karlene, a ward of a Juvenile Court. Petitioners granted consent to the marriage of their daughter when she was eleven years old; the consents were given in West Virginia where the marriage was celebrated and consummated. Several months later, in Ohio, the petitioners were identically charged in separate complaints with tending to cause the delinquency of Karlene Gans in that they did consent to said child securing a marriage license and misrepresenting her age (R. 17, 18) (Appendix C, Extract 2, p. 39a, *infra*).

By stipulation of all parties, the cases were consolidated and tried as a single case with one record (R. 43).

By way of defense, petitioners asserted *inter alia*, their right to grant consent to the marriage by reason of express Ohio statutory authority. The Prosecution, before trial, moved to amend the complaints to charge petitioners with entering into a conspiracy in Ohio to commit perjury in West Virginia so as to effect and permit the marriage of their daughter and that said conspiracy was accomplished (R. 19, 21) (Appendix C, pp. 39a-40a, *infra*, Extract 3). The motions were denied (R. 42, 43) (Appendix C, p. 40a, *infra*, Extract 3), and the Prosecution then proceeded on the theory that under extant Ohio statutes the petitioners could not grant consent to the marriage and that only the Juvenile Court had such authority.

The trial court in its instructions to the jury charged that the petitioners were being tried upon complaints predicated upon Subdivision (E) of Section 2151.02, O. R. C. (R. 170) (Appendix C, p. 39a, *infra*, Extract 2-A) and repeatedly charged the jury that under the statutes only the Juvenile Court could give consent to the marriage (R. 171, 172) (Appendix C, pp. 39a, 40a, *infra*, Extracts 2-B, 2-C, 2-D and 2-E). Petitioners were convicted and sentenced.

Appeal was perfected to the Court of Appeals upon four assignments of error embodying fifteen specifications, all of which were unanimously upheld and the trial court reversed (R. 213, 214) (Appendix B, pp. 33a, 34a, *infra*). The Court of Appeals based its opinion and judgment upon the record and its interpretation of Subdivision (E) of Section 2151.02, O. R. C., upon which the complaints were based (R. 210) (Appendix B, p. 30a, *infra*).

Appeal was taken by the State to the Supreme Court of Ohio. That Court specifically agreed that petitioners could not be guilty (R. 233) (Appendix B, pp. 11a, 12a, *infra*) under a complaint predicated upon Subdivision (E) of Section 2151.02, O. R. C., but then enunciated its opinion of first

impression that no one, not even the Juvenile Court, had authority to consent to the instant marriage. Further, the Court held, the tendency of the effect of the marriage would be to probably cause Karlene to become a habitual truant from school, or, if not, that her attendance at school could tend to cause her to act so as to adversely affect the morals of her classmates (R. 240, 241) (Appendix B, pp. 18a, 19a, *infra*).

The Supreme Court then reversed the Court of Appeals and affirmed the convictions for violations predicated upon Subdivisions (C) and (D) of Section 2151.02, O. R. C., which are enumerations defining, as delinquent, respectively, a child who is a habitual truant from home or school, or who deports himself as to injure or endanger the morals or health of himself or others (R. 242) (Appendix B, pp. 19a, 20a, *infra*).

Reasons for Granting the Writ

(1) The Second Question presented herein is of special importance because it poses the query whether fundamental principles of liberty and justice, as protected by the Fourteenth Amendment, require, as one of the attributes of a fair trial, that the charge of the trial court upon the statute on which conviction rests must be in accord with the interpretation of such statute as rendered by the highest reviewing court.

The importance of the question is further magnified by the simple fact that it concerns all individuals and the protection afforded them by the Fourteenth Amendment, not just Carl and Katherine Gans. Review is necessary to establish as a matter of constitutional law the accepted but unreported principle that a fair trial requires law instructions on criminal statutes to be in consonance with the interpretations of such statutes as made by the highest reviewing court.

Because so consistently followed and applied in principle by reviewing courts there have been no previous cases which have necessitated positing the query so baldly as a matter of constitutional law.

As a matter of judicial case history and procedure, it would appear that the practice has simply been to leap from the proposition that law instructions must be correctly charged (or at least not be fatally prejudicial, if erroneous, or be an error of commission) to a reversal if not so charged; the underlying but definitively unreported principle of a substantive or procedural due process fair trial *requirement* being assumed.

(2) One of the primary duties of a trial court is to charge the law correctly as it pertains to the issues; as a corollary, the requirement of a fair trial, with all its inherent attributes, stands as one of the primary reasons for the existence of any reviewing court.

It would be ill and empty protection indeed to guarantee those other attributes of a fair trial, but affirm a conviction without requiring an instruction of law consonant with highest reviewing courts' interpretation of that law.

The right of an accused to a correct instruction of law to the jury upon the statute on which the complaint is based is so basic to the very idea of justice that it may not be denied even though it is the action of the reviewing court, after trial, which initially establishes the error of the instructions. The charge is no less fatal to the accused simply because neither the trial court nor the accused could anticipate that the highest reviewing court would deny and contradict them both. The jury could do no other than accept the charge as given and was dutybound to apply it.

In the instant matter, the trial court specifically charged the jury that Karlene Gans required the consent of the Juvenile Court of Crawford County in order to get married (R.-171), (Appendix B, Extracts 2-B and 2-C, p. 39a,

infra). The Supreme Court clearly held that the Juvenile Court of Crawford County had no authority to grant consent to the marriage (R. 235), (Appendix B, p. 13a, *infra*). Apart from all right of the Supreme Court of Ohio to, with finality, determine the meaning and intent of Ohio law, it cannot be said that the trial court's charge did not fatally infect the trial and deny to petitioners the fair trial required by the Fourteenth Amendment.

(3) The importance of the first question lies in the necessity for spelling out the applicability of the principles of the *Dejonge* and *Cole* cases (*Dejonge* v. *Oregon*, 299 U. S. 353, 362; *Cole* v. *Arkansas*, 333 U. S. 197, 201), to cases where subdivisons of a single statute are involved.

> "Conviction on a charge not made would be sheer denial of due process." *Dejonge* v. *Oregon*, 299 U. S. 353, 362.
>
> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas*, 333 U. S. 197, 201.

Two numerically separate statutory sections were involved in the *Cole* case, whereas, the instant matter presents the circumstance of separate subdivisons of a single statutory section. However, the expediency and structural benefit derived from subdivisional grouping within a single section of a code should not be permitted to override the principle of strict construction of criminal statutes or the requirement for due process of law.

(4) Affirmation of these questions is necessary and will further serve the end of correcting a manifest error on the part of the Supreme Court of Ohio, which error is made more gross by reason of the record exhibiting not a single shred of evidence to sustain the convictions of Carl and Katherine Gans under Subdivisions (C) and (D), had they been so charged.

The Ohio Supreme Court clearly erred in basing its affirmance of conviction (reversing the intermediate appellate court) upon a prognosis of future events which were completely unsupported by the record. The court said that the minor female's lawful marriage in West Virginia would in all probability result in habitual truancy in Ohio because the "duties of homemaking are strenuous and * * * there is a certain propensity among young married couples to propagate" (R. 239, Appendix B, p. 17a). Petitioners do not challenge the evaluation of the burdens and propensities of young married life; they do question the conclusion that truancy will result. The record clearly shows that the unusual physical condition of the minor female involved, i.e., beginning of menstruation at the age of four years and its duration for prolonged periods, while it resulted in extended periods of legal absences from school for health reasons, did not result in significant diminution of her scholastic achievements. On the contrary, these achievements were superior (R. 128, 130-132, Appendix B, pp. 17a-18a).

The court further said, "It is unfortunate but true that, assuming that Kay *should* remain in school, the more successful her marriage would be the more it could tend to cause her to act so as to adversely affect the morals of her classmates" (R. 241, Appendix B, p. 19a). There is no logical answer to this illogical argument. The pleasures of married life are self-evident—at least to those who are married; that they "impair the morals" of those who are not is non-evident. As a minimum, it is not for an appellate court of law to decide *ad hoc*—and contrary to the record, that this result will follow.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS F. MCCLANE,
% American Civil Liberties Union,
170 Fifth Avenue,
New York 10, New York.

DONALD J. LETT,
501-514 Richland Trust Building,
Mansfield, Ohio,
Counsel for Petitioners.

ROBERT K. RATH,
JACK G. DAY,
ROWLAND WATTS,
Of Counsel.

APPENDIX A

Statutes Involved

(Page's) Ohio Revised Code, Section 2151.02

"DELINQUENT CHILD" DEFINED.

As used in Sections 2151.01 to 2151.54, inclusive, of the Revised Code, "delinquent child" includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state;

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority.

(Page's) Ohio Revised Code, Section 2151.41

PROHIBITION AGAINST ABUSE OF OR ABETTING DELINQUENCY OF CHILD.

No person shall abuse a child or aid, abet, induce, cause, encourage, or contribute to the dependency, neglect, or delinquency of a child or a ward of the juvenile court, or act in a way tending to cause delinquency in such child. No person shall aid, abet, induce, cause, or encourage a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent. Each day of such contribution to such dependency, neglect, or delinquency is a separate offense.

Appendix A—Statutes Involved

(Page's) Ohio Revised Code, Section 3101.01

PERSONS WHO MAY CONTRACT MATRIMONY.

Male persons of the age of eighteen years, and female persons of the age of sixteen years not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A minor must first obtain the consent of his parents, surviving parent, parent awarded custody by a court of competent jurisdiction, the guardian of his person, or any one of the following who has been awarded permanent custody of him by a court exercising juvenile juridiction:

(A) An adult person;

(B) The department of public welfare or any child welfare organization certified by such department;

(C) A county department of welfare or a county child welfare board.

A minor shall not be required to obtain the consent of a parent who resides in a foreign country, has neglected or abandoned such minor for a period of one year or longer immediately preceding his application for a marriage license, has been adjudged incompetent, is an inmate of a state mental or penal institution, has been permanently deprived of his custody by a court exercising juvenile jurisdiction, or has been deprived of his custody or control, or both, by the appointment of a guardian of the person of the minor by the probate court or by any other court of competent jurisdiction.

(Page's) Ohio Revised Code, Section 3101.04

CONSENT OF JUVENILE JUDGE.

(A) When a minor has no parent, guardian, or custodian whose consent is required, the judge of the juve-

nile court of the county in which the female resides may, upon application of both the contracting parties, an entry being made upon its journal, give consent and approbation in the probate court for the marriage.

(B) When the condition of a minor female is such as imperatively to impel the marriage estate by reason of approaching maternity, of when an illegitimate child has been born, the matter shall be inquired into by the juvenile court. If as a result of the inquiry, one or both of the parents are made wards of the court, said court may, with the consent of said wards, their parents, if any are living, or of any guardian or custodian, give consent in the probate court. The probate court may thereupon issue a license, notwithstanding either or both the contracting parties for the marital relation are under the minimum age prescribed in Section 3101.01 of the Revised Code, but such license shall not issue until Section 3101.05 of the Revised Code has been complied with, and until such illegitimate child has been born, or it is found beyond doubt that it is a maternity case.

(Page's) Ohio Revised Code, Section 3321.01

COMPULSORY SCHOOL AGE FIXED.

A child between six and eighteen years of age is "of compulsory school age" for the purpose of Sections 3321.01 to 3321.13, inclusive, of the Revised Code; but the board of education of any district may by resolution raise the minimum compulsory school age of all children residing in the district to seven, subject to subsequent modification to six; and the compulsory school age of a child shall not commence until the beginning of the term of such schools, or other time in the school year fixed by the rules of the board of the district in which he resides.

The parents, guardians, or other persons who have the care of a child of compulsory school age shall instruct him,

or cause him to be instructed as provided in such sections, unless he is employed on age and schooling certificate, or shall have been determined to be mentally incapable of profiting substantially by further instruction.

(Page's) Ohio Revised Code, Annotated, 1958 Supplement, Section 3321.03

CHILD MUST ATTEND SCHOOL.

Every child of compulsory school age who is not employed under an age and schooling certificate and has not been determined to be incapable of profiting substantially by further instruction shall attend a school which conforms to the minimum standards prescribed by the state board of education, under the conditions prescribed by law.

(Page's) Ohio Revised Code, Annotated, 1958 Supplement, Section 3321.04

COMPULSORY ATTENDANCE.

Every parent, guardian, or other person having charge of any child of compulsory school age who is not employed under an age and schooling certificate and who has not been determined to be incapable of profiting substantially by further instruction, must send such child to a school, which conforms to the minimum standards prescribed by the state board of education, for the full time the school attended is in session, which shall not be for less than thirty-two weeks per school year. Such attendance must begin within the first week of the school term or within one week of the date on which the child begins to reside in the district or within one week after his withdrawal from employment.

Excuses from future attendance at or past absence from school may be granted for the causes, by the authorities, and under the following conditions:

(A) The superintendent of schools of the district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:

(1) That his bodily or mental condition does not permit his attendance at school during such period;

(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or the qualifications of the person instructing the child at home were determined. All such excuses shall become void and subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents, guardians, or other persons having him in charge may be proceeded against after due notice whether such excuse be recalled or not.

(B) The state board of education may adopt rules and regulations authorizing the superintendent of schools of the district in which the child resides to excuse a child over fourteen years of age from attendance for a future limited period for the purpose of performing necessary work directly and exclusively for his parents or legal guardians.

All excuses provided for in divisions (A) and (B) of this section shall be in writing and shall show the reason for excusing the child. A copy thereof shall be sent to the person in charge of the child.

(C) The board of education of the city, exempted village, or county school district in which a public school is located or the governing authorities of a private or parochial school may in the rules and regulations governing the discipline in such schools, prescribe the authority by which and the manner in which any child may be excused for absence from such school for good and sufficient reasons.

The state board of education may by rules and regulations prescribe conditions governing the issuance of excuses which shall be binding upon the authorities empowered to issue them.

(Page's) Ohio Revised Code, Section 3321.22

JUVENILE COURT PROCEEDINGS.

If the parent, guardian, or other person in charge of a child, upon complaint for a failure to cause the child to attend school or a part-time school or class, proves inability to do so, then such parent, guardian, or other person in charge of a child shall be discharged, and thereupon the attendance officer shall make complaint before the judge of the juvenile court of the county that the child is a delinquent child or dependent child within the meaning of Section 2151.02 or 2151.04 of the Revised Code. Such judge shall hear the complaint and if he determines that the child is a delinquent or dependent child within one of such sections he shall deal with the child according to Section 2151.35 or 2151.36 of the Revised Code.

APPENDIX B

Opinions and Judgments

Letter Judgment: Rehearing Denied

STATE OF OHIO
OFFICE OF CLERK OF THE SUPREME COURT
Columbus

October 8, 1958

Mr. John D. Sears, Jr., Bucyrus, Ohio
Messrs. Henkel, Ross, Sauter & Lett
Mr. Donald J. Lett, Mansfield, Ohio

In re: Case No. 35204

State of Ohio, Plaintiff-Appellant,
v.
Katherine Gans, Defendant-Appellee.

In re: Case No. 35205

State of Ohio, Plaintiff-Appellant,
v.
Carl Gans, Defendant-Appellee.

Gentlemen:

I am directed by the Supreme Court to advise counsel in the above entitled causes that the Court has considered the applications for rehearing filed therein and a rehearing is denied in each case.

Very truly yours,

(Signed) ELLIOTT E. WELCH,
Clerk.

is

Appendix B—Opinions and Judgments

Opinion and Dissent, Supreme Court of Ohio

The State of Ohio, Appellant, v. Gans, Appellee. (Two cases) Criminal law—Acts tending to cause delinquency in child—Section 2151.41, Revised Code—Proof of actual delinquency not necessary to conviction—parents of female child under 16— Act in way tending to cause delinquency, when—Participate in enabling child to marry—Section 2151.02, Revised Code.

(1) Where it is charged that a defendant did "act in a way tending to cause delinquency" in a child, it is not necessary, for a conviction, to establish an actual delinquency, but only that the acts of the defendant were within themselves of such a nature that they would tend to cause delinquency in such child, as delinquency is defined by Section 2151.02, Revised Code. (State v. Miclau, Jr., 167 Ohio St., 38, distinguished.)

(2). Where the parents of a female person under 16 years of age actively participate in enabling such person to enter into a marriage relationship, such participation constitutes acts tending to cause the child to become a "delinquent child" as defined by Section 2151.02, Revised Code, and the parents "Act in a way tending to cause delinquency in such child" in violation of Section 2151.41, Revised Code.

(Nos. 35204 and 35205—Decided July 9, 1958)

Appeals from the Court of Appeals for Crawford County.

The defendant, appellees herein, the adoptive parents of Kay Gans who because of a previous finding of neglect was a ward of the Juvenile Court, were charged with acts tending to cause delinquency in Kay.

The facts leading to such charges are as follows:

In October 1955 when Kay was 11 years of age, the defendants transported her together with one Stanley Thorn, from their home in Crawford County, Ohio, to Morgantown,

West Virginia, for the avowed purpose of attending a football game. While in Morgantown the defendants accompanied Kay and Stanley to the marriage license bureau, where she, representing her age as 17 years, procured a license to marry Stanley. The defendants signed the consent to the issuance of said license. Shortly thereafter Kay and Stanley were married in West Virginia, and they returned to Ohio to live.

Upon these facts complaints were issued, and the defendants were tried and found guilty in the Juvenile Court.

Upon appeals to the Court of Appeals, the judgments were reversed and the complaints were dismissed.

The causes are before this court pursuant to the allowance of motions to certify the records.

Mr. John D. Sears, Jr., prosecuting attorney, for appellant.

Messrs. Henkel, Ross, Sauter & Lett, for appellees.

Matthias, J. The complaints herein charge that defendants "did act in a way tending to cause the delinquency of * * * Kay Gans, age 17 * * * in that * * * (said defendants) did consent to said child securing a marriage license and misrepresenting her age."

These complaints charge an offense under the provisions of Section 2151.41, Revised Code, which reads as follows:

> "No person shall abuse a child or aid, abet, induce, cause, encourage, or contribute to the dependency, neglect, or delinquency of a child or a ward of the Juvenile Court, *or act in a way tending to cause delinquency in such child.* No person shall aid, abet, induce, cause, or encourage a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent. Each day of such contribution to such dependency, neglect, or delinquency is a separate offense." (Emphasis added.)

The first clause of the first sentence of that section was interpreted and applied by this court in the case of State v. Miclau, Jr., 167 Ohio St., 38, 146 N. E. (2d), 293. In that case this court determined that before one may be found guilty of *contributing* to the delinquency of a child it must first be established by evidence beyond a reasonable doubt that there was some delinquency of such child which the defendant either aided, abetted, induced, caused or to which he contributed. The finding of the court in that case, however, was limited to the first clause in Section 2151.41 by the writer of the opinion when he said, "further, it should be noted that the affidavit does *not* charge that defendant did, to use some of the words of that statute, 'act in a way tending to cause delinquency.' "

Thus, the Miclau case is not applicable to the facts of the instant cases since the complaints herein are based upon the second clause of the first sentence of Section 2151.41, referring to acts "*tending* to cause delinquency."

It is apparent that the purpose of that clause is to prevent a delinquency before it occurs rather than to await such delinquency and then punish the adult offender. The purpose of the clause is to avoid the undesirable result which might arise if an adult is permitted to pursue a course of conduct which tends to cause a child to become a delinquent. It is the old theory of preventative medicine. A disease is much easier to prevent than to cure. Under this clause in Section 2151.41, it is not necessary that the acts complained of result in delinquency, but only that the acts are such as would tend to cause delinquency in the child. See Williams v. City of Malvern, 222 Ark., 432, 261 S. W. (2d), 6; People v. Ostrowski, 334 Ill. App., 494, 80 N. E. (2d), 89; and People v. Mitchell, 148 Cal. App. (2d), 733, 307 P. (2d), 411.

The acts upon which the complaints herein are based are the consents of defendants to Kay's misrepresenting her age and securing a marriage license.

It is here noted that the fact that such consents were given in a state other than Ohio is immaterial to the charges at hand because of the facts that Kay was an Ohio resident, and that she intended to remain so after her marriage.

It is also noted that *the validity of the marriage is not in question here.* The sole question is whether the defendants acted "in a way tending to cause delinquency" in Kay.

A delinquent child is defined by Section 2151.02, Revised Code, as follows:

> "* * * 'delinquent child' includes any child:
>
> "(A) Who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state;
>
> "(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;
>
> "(C) Who is an habitual truant from home or school;
>
> "(D) Who so deports himself as to injure or endanger the morals or health of himself or others;
>
> "(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

It is conceded that, in order for the defendants to be guilty of violations of that part of Section 2151.41 with which we are concerned, their acts must have been such as would tend to cause Kay to become a "delinquent child" as defined by Section 2151.02, supra.

In its opinion in the instant cases, the Court of Appeals stated that "it will be observed that if the marriage of the

minor in the instant case can be found to be an act of delinquency it must be found in subsection (E) of the above-quoted section (Section 2151.02, supra)." That conclusion implies a much too narrow construction of that section. Although we agree wholeheartedly with the Court of Appeals that Kay did not act in such a way that she could be found to be a "delinquent child" under the provisions of subdivision (E) of Section 2151.02, since she did have her parents' consent to marry, it does not follow that the convictions of the defendants should be reversed. The complaints under which the defendants were tried and convicted by a jury are not limited to subdivision (E), supra, but include only a statement of the operative facts which the state claims tended to cause delinquency in Kay. Therefore, unless it is found that the acts of defendants did not tend to cause Kay to be a delinquent child as defined by any of the subdivisions of Section 2151.02, the convictions may not be disturbed. We will now proceed to examine the facts herein, in the light of the above.

It is beyond dispute that so-called "child marriages" are against the public policy of Ohio. Section 3101.01, Revised Code, establishes such public policy with respect to marriage and reads, in part, as follows:

> "Male persons of the age of 18 years, and female persons of the age of 16 years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A minor must first obtain * * * consent * * *."

The first sentence of that statute sets forth who "may be joined in marriage." It follows that all persons not included in the terms of reference of such sentence may *not* "be joined in marriage." The statute specifically limits those who "may be joined in marriage" to "male persons of the age of 18 years, and female persons of the

age of 16 years," without other disability. It follows that male persons *under* the age of 18 years and female persons *under* the age of 16 years (and first cousins and persons having living spouses) may not be joined in marriage.

The second sentence of Section 3101.01 provides that "a minor must first obtain * * * consent" to marry. In the light of the first sentence of the statute, however, it is apparent that the word, "minor," described only those minors who may be joined in marriage upon obtaining consent, and such minors are male persons between the ages of 18 and 21 and female persons between the ages of 16 and 21. *That statute does not contemplate the joining in marriage either of any male person under 18 years of age or of any female person under 16 years of age.*

In the courts below, the question was raised and dealt with extensively as to who might, should or could have given consent to Kay's marriage, the defendants arguing that under all the facts and circumstances of the instant cases *they* had such a right, being her adoptive parents and one of them being her legal custodian. The state argues that only the Juvenile Court could have consented to this marriage. How can *anyone* consent to an act which is against public policy? Under the facts herein no one, not even the Juvenile Court, could have consented to Kay's marriage.

The only exception to the public policy against the marriage of male and female persons under the ages of 18 and 16, respectively, as set out hereinbefore, is set forth in Section 3101.04, Revised Code, wherein it is provided that if a minor female person either is proved to be pregnant or has delivered an illegitimate child the Juvenile Court may inquire into the matter, and "if as a result of the inquiry, one or both of the parents are made wards of the court, said court may, with the consent of said wards, their parents, if any are living, or of any guardian or custodian, give consent in the Probate Court." The statute

provides further that "the Probate Court may thereupon issue a license, notwithstanding either or both the contracting parties for the marital relation are under the minimum age prescribed in Section 3101.01 of the Revised Code."

Section 3101.04 is merely a declaration by the General Assembly that the general public policy against "child marriages" must yield to a more important public policy based on the premise that a greater social benefit is derived from having as many members of our society as possible born and raised as "legitimate" rather than "illegitimate" children.

Since there is no indication in the records of the instant cases that Kay was either pregnant or had delivered an illegitimate child at the time of her marriage, it is seen that Section 3101.04 is immaterial to the question at hand, except that its very existence strengthens our conclusion that it was the intent of the General Assembly, that except in specifically described circumstances, no male person under the age of 18 and no female person under the age of 16 shall "be joined in marriage" *with or without consent*. The reason for such public policy is clear.

In keeping with the increasing complexity of our modern civilization and the absolute necessity of a certain amount of maturity and knowledge on the part of each member thereof, the General Assembly has declared that male persons under 18 and female persons under 16 do not have the maturity and knowledge requisite to the entering of the marriage relationship with a full awareness of the ensuing obligations and responsibilities to their spouses, to the society in which they would establish themselves and to the children which they would rear. The General Assembly has declared further that, although male persons between the ages of 18 and 21 and female persons between the ages of 16 and 21 *might* have such a degree of matur-

ity and knowledge as to be capable of creating a stable marriage relationship in which to rear children, final judgment on such matters must be made by a mature person or an institution having such right.

The court realizes that neither the physiology of man nor some of his more basic instincts have changed much since he first became identifiable as "homo sapiens." It is unquestioned that the "mating instinct" per se is and has been throughout the centuries one of such basic instincts, and that throughout the centuries male and female persons have been physically capable of realizing and fulfilling such instinct at an age earlier than that prescribed by the Ohio General Assembly as the minimum age at which two persons may "be joined in marriage."

It is a matter of historic fact, however, that until a comparatively recent date the primary role played in "marriages" all over the world by the female person was solely that of consort and childbearer. Here again it is evident that a woman may well be capable of these activities prior to reaching the age of 16. It is also a matter of fact that in many countries of the world today these traditions still persist. It is noted, however, that, as a general rule, whenever and wherever the scope of a "wife's" activity is limited by custom, tradition or law merely to consortium and childbearing, she is looked upon as nothing much more than a chattel—a piece of personal property to be treated and dealt with as such.

It is undisputable and apparent to even the casual observer that such is no longer the case in our western civilization. Here woman has won a place for herself in the eyes of both the community and the law wherein she is distinguishable from male members of the community only by virtue of physical characteristics. She may vote, hold office, own property, initiate divorce proceedings, inherit, enter into contracts and, in general, engage in all those

activities which were formerly restricted to male participation.

However, with this new freedom have come new responsibilities—responsibilities formerly shouldered only by male members of the community. Although it would be possible to expound at length on this particular subject, suffice it to say that education is one of such responsibilities.

After providing, in Section 3321.01, Revised Code, that "a child (male or *female*) between 6 and 18 years of age is of 'compulsory school age,'" the General Assembly, in Section 3321.03, went on to provide that "*every child of compulsory school age* who is not employed under an age and schooling certificate and has not been determined to be incapable of profiting substantially by further instruction *shall attend a school* which conforms to the minimum standards prescribed by the state Board of Education, under the conditions prescribed by law."

The General Assembly then stated, in Section 3321.04, that it is the duty of every parent to see that a child between 6 and 18 does in fact attend school unless excused therefrom for one or more of the reasons set out in the latter part of the statute. A close examination of those reasons fails to disclose that marital duties, such as house cleaning, cooking, washing, caring for infants, etc., are among them.

These sections of the Code exemplify another public policy of this state, which is that our free civilization in this country and in this state will maintain itself and advance only as its members become educated so as to be able to add their knowledge to that of their forefathers and thus progress.

We do not mean to imply that a high school education provides a modern person with world-shaking tools of knowledge such as those of the scientists who work with atomic energy. It seems beyond argument to this court, however, that a child who is not *at least exposed* to his own

potentialities by a high school education (that contemplated by the statutes here under consideration) can hardly be expected to realize his potential either to himself or to his community, regardless of his basic or natural intelligence.

The court notes that a high school education is an absolute prerequisite to obtaining most jobs nowadays, and that it is most likely that Kay will need or want a job at sometime in the future.

These are obviously the reasons for the public policy of this state regarding compulsory school attendance, as set out in Chapter 3321 of the Revised Code, and we are in whole hearted agreement therewith.

At this point it is most significant to note that Section 3321.22, Revised Code, provides:

> "If the parent, guardian, other person in charge of a child, upon complaint for a failure to cause the child to attend school * * * proves inability to do so, then such parent, guardian, or other person in charge of a child shall be discharged, and thereupon the attendance officer shall make complaint before the judge of the Juvenile Court of the county *that the child is a delinquent child * * * within the meaning of Section 2151.02 * * * of the Revised Code.* * * *"* (Emphasis added)

Although the records in these cases are silent as to whether Kay's marital duties have yet caused her truancy, this court would be remiss in its duty if it shut its eyes to the facts that the duties of homemaker are strenuous, and that there is a certain propensity among young married couples to propagate, neither of which activity is conducive to regular attendance at school.

An exhibit introduced by the defendants herein is Kay's "report card" for the years 1954 and 1955 and covering her work in the fifth grade at Saint Joseph School. Of a

total of 93 grades reported thereon, both intermediate and final, Kay received 43 "A's" 49 "B's," and only one "C", while being absent with excuse for a total of 43½ days! In another section of the card relating to "Relations to God" and "Relations to Neighbor and Self", which contains 10 subdivisions resulting in a total of 60 marks, Kay was *uniformly* marked "Attitudes and Habits commendable." Although there are provisions for indicating "Improvement Desirable," Kay received *no* such marks. In still another section of the card there is a space for indicating "Possible Causes for Deficiencies in Achievement." That section contains no marks whatsoever. There were apparently no "deficiencies" in Kay's achievement.

This is surely a "report card" of which most parents would be extremely proud. However, instead of encouraging Kay to continue to realize her potential, which as to their children is the natural and legally imposed duty of *all* parents with respect to compulsory schooling, as set out in Chapter 3321, Kay's parents, the defendants herein, chose instead to encourage and actively participate in making possible her marriage—an activity which, as already indicated, would have strong propensities to render Kay incapable of continuing her school attendance, with the probable result that she would, before reaching 18 be found a delinquent child because of truancy.

This court finds, therefore, that the tendency of the acts of the defendants in consenting to Kay's misrepresenting her age and obtaining a marriage license is to encourage actions on the part of Kay which would in all probability cause her to be found to be a delinquent child under subdivision (C) of Section 2151.02, Revised Code, which described as a delinquent child one "who is an habitual truant from home or school."

Although this alone is sufficient to sustain the convictions below, there is yet another aspect of the acts of the defendants which would tend to cause delinquency in Kay.

Subdivision (D) of Section 2151.02, supra, provides that a delinquent child is one "*who so deports himself as to injure or endanger the morals* or health of himself or others."

Even if we were to assume for the purpose of argument that it is not probable that Kay's schooling will be frustrated by her marriage, and were to assume that she will continue to attend school, it is at once apparent that she will, by virtue of her marriage, have certain knowledge and attitudes which will be far more mature than those of her classmates and about which most of her classmates will, if at all, only have begun to think seriously. It is such knowledge and attitudes that, even in more mature years, tend to keep married groups and single groups separate.

It is unfortunate but true that, assuming that Kay *should* remain in school, the more successful her marriage would be the more it could tend to cause her to act so as to adversely affect the morals of her classmates.

In conclusion, it is quite apparent that Section 2151.01, Revised Code, embodies some of the reasons why the public policy of this state is against "child marriages," since it is seen that the consequences of such marriages tend to cause a child to become a delinquent as defined herein. Children of tender years tend to be guided more by adult advice and example and by their own unformed emotions than by thought and reflection. The Juvenile Court is concerned more with correction and prevention, if at all possible, than with punishment per se. Thus, although the minor participants in "child marriages" are "more to be pitied than scorned," the same attitude does not hold true of adults who participate in effecting such marriages—and it is the opinion of this court that it will behoove all adults, including parents, to discourage such marriages.

Without pursuing further possibilities of consequences necessarily resulting from her marriage which would tend

to cause Kay to become a "delinquent child" as defined by Section 2151.02, it is apparent that the acts of the defendants tend to cause the consequences hereinbefore outlined, and that they were guilty of acting "in a way tending to cause delinquency" in Kay.

It follows that the Court of Appeals erred in reversing the judgments rendered in the Court of Common Pleas, and that the judgments of the Court of Appeals should be, and they hereby are, reversed.

Judgments reversed.

WEYGANDT, C. J., ZIMMERMAN, BELL and HERBERT, JJ., concur.

STEWART and TAFT, JJ., dissent.

Taft, J., dissenting. I hope that a dissent from the judgments in the instant cases will not be incorrectly construed as an approval of child marriages. As stated by Middleton, P. J., in the opinion of the Court of Appeals:

> "* * * the court, in ruling upon the issues in this case, is concerned only in determining the law applicable to the case. This is as far as the court's authority goes, and it is not for the court to pass upon the social or moral questions which may be involved."

In determining the applicable law we should start with two elementary propositions:

> (1) No act, however atrocious or shocking to our social and moral standards, can be punished criminally in Ohio except where punishment therefor is provided for by statute. 15 Ohio Jurisprudence (2d) 245, Section 7.

(2) Penal statutes must be strictly construed. 15 Ohio Jurisprudence (2d) 253, Section 20.

Because of the first of the foregoing elementary propositions, the majority opinion apparently recognized the necessity that the state establish some delinquency of defendants' daughter, as delinquency is defined in Section 2151.02, Revised Code, which the action of defendants may tend to cause.

The majority opinion clearly discloses that, in order to find any trace of such delinquency, it is necessary not only to indulge in imaginative speculation as to the future of defendants' daughter but also to stretch the words of the applicable statute (Section 2151.02, Revised Code) as far as they will reasonably go, and apparently even much farther, in a direction away from that called for by the elementary rule of strict construction of penal statutes.

Thus, the only possible traces of any such potential delinquency suggested by the majority opinion are based upon the portions of Section 2151.02, Revised Code, defining a delinquent child as one "(C) who is an habitual truant from * * * school"; or "(D) who so deports * * * (herself) as to injure or endanger the morals * * * of * * * others." It is necessary to indulge in much imaginative speculation with regard to her future to conclude that defendants' daughter may, by reason of the acts of defendants in enabling her to get married, either become an habitual truant from school or deport herself so as to injure or endanger the morals of others.

The syllabus describes as to criminal acts (i.e., those tending to cause defendants' daughter to become a delinquent child) the active participation of defendants in enabling their daughter to enter into a marriage relationship. Admittedly, the marriage took place in West Virginia. It is not suggested that the marriage was illegal there (it

was apparently legal there. Perkey v. Perkey, 87 W. Va., 656, 106 S. E. 40) or that that West Virginia marriage will not be recognized as a legal marriage in Ohio (it will apparently be recognized as a legal marriage in Ohio. Courtwright v. Courtwright, 11 Dec. Rep., 413, 26 W. L. B., 309, affirmed without opinion, 53 Ohio St., 685). Also, the participation of defendants in enabling such marriage apparently only represented, as the complaint clearly indicates, action in West Virginia to accomplish something apparently lawful where it was accomplished.

It may be that legislation is needed to provide against actions such as those of defendants outside Ohio which tend to cause child marriages of Ohio children outside Ohio. However, this court has no power or authority to enact such legislation.

Stewart, J. concurs in the foregoing dissenting opinion.

Judgment, Supreme Court of Ohio

(Appeal From the Court of Appeals of Crawford County)

IN THE

SUPREME COURT OF THE STATE OF OHIO

The State of Ohio } January Term, A.D. 1958
City of Columbus } To-wit: Wednesday, July 9th

No. 35204

State of Ohio,

Appellant,

vs.

Katherine Gans,

Appellee.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Crawford County,

and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Juvenile Court be, and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellee its costs expended in this Court and in the Court of Appeals taxed at $

ORDERED, That a special mandate be sent to the Juvenile Court of Crawford County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Crawford County, "for entry."

I, ELLIOT E. WELCH, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

WITNESS my hand and the seal of said Court this 16th day of July, 1958.

ELLIOT E. WELCH,
Clerk of the Supreme Court of Ohio
By ....., Deputy.

Appendix B—Opinions and Judgments

THE SUPREME COURT OF OHIO

THE STATE OF OHIO }
City of Columbus }

To the Honorable Juvenile Court

Within and for the County of Crawford, Bucyrus, Ohio, greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of State of Ohio, Appellant, vs. Katherine Gans, Appellee, into execution.

WITNESS, ELLIOT E. WELCH, Clerk of our said Supreme Court of Ohio, at Columbus, this 16th day of July, A.D. 1958.

....., Clerk.

By ....., Deputy.

Appendix B—Opinions and Judgments

Opinion, Court of Appeals

COURT OF APPEALS

THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
CRAWFORD COUNTY

Number 1519

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

KATHERINE GANS,
Defendant-Appellant.

Number 1520

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARL GANS,
Defendant-Appellant.

MIDDLETON, *P.J.*:

These cases are in this court on appeal from the Juvenile Court of Crawford County, Ohio.

While separate complaints were filed against the defendants, they were tried at the same time, before the same jury, and upon the same evidence, and will be considered together in this court.

The defendants, Katherine Gans and Carl Gans, are the parents, by adoption, of one Kay Gans, and are charged

in identical complaints, with acting in a way to cause the delinquency of Kay Gans, their adopted daughter, a child of eleven years of age. Upon trial, they were found guilty and sentence was imposed. It is from this judgment that appeal is prosecuted to this court.

Each complaint, omitting the formal parts, charged that the defendant on or about the 24th day of October, 1955, in the County of Crawford "did act in a way tending to cause the delinquency of Kay Gans, age eleven years, born October 12, 1944, said child being a ward of the Juvenile Court of Crawford County, Ohio, in that said (name of defendant) did consent to said child securing a marriage license and misrepresenting her age."

The record discloses the following facts: In July, 1951, Kay Gans, the minor involved in this action, was declared by the Juvenile Court to be a neglected child and the court ordered "said child be continued in the custody of her father, Carl Gans, to be cared for by Mrs. Paul Wisler, 126 Southeast Street, Calion, Ohio, in her home and shall continue within the jurisdiction of the court until she shall have attained the age of twenty-one years, and that final judgment or commitment to any other place, person or institution is hereby stayed and suspended."

Subsequently, on December 31, 1953, the Juvenile Court of Crawford County, Ohio, found said Kay Gans to be a neglected child and ordered "said child be continued in the custody of her father and shall continue within the jurisdiction of the court until further order of the court; and that final judgment or commitment to any other place, person or institution is hereby stayed and suspended."

The testimony discloses that Kay Gans was, at the time of the acts charged, of the age of eleven years; that the defendants and said child were at the time living in Crawford County; that on or about October 21, 1955, the defendants, their daughter, and one Stanley Thorn drove

from Crawford County, Ohio, to Morganstown, West Virginia, and upon reaching Morganstown, West Virginia, they all went to the courthouse where an application was made on October 22, 1955, for a marriage license for defendants' daughter and Stanley Thorn. In this application the daughter gave her age as seventeen years. At the bottom of the application the defendants signed their consent to the marriage, this consent stating that they were the parents of Karlene Kay Gans, a minor, born on the 12th day of October, 1944. Several days later, on October 24th, the young couple were married.

We are mindful that this case is of considerable social significance and of imporfance, not only to the defendants, but also to the general public; that the state is interested in the safeguarding and protection of all of its children. While recognizing this truth, the court, in ruling upon the issues in this case, is concerned only in determining the law applicable to the case. This is as far as the court's authority goes, and it is not for the court to pass upon the social or moral questions which may be involved.

The appellants' assignments of error set forth four separate assignments:

1. The court erred in overruling defendants-appellants' motion for dismissal of the complaints.

2. The court erred in overruling defendants-appellants' motions for a directed verdict made at the end of the state's case and at the conclusion of all the evidence.

3. The court erred in overruling defendants-appellants' motions to discharge the defendants-appellants, made prior to the commencement of the trial, after opening statements, at the end of the state's case, at the end of defendants-appellants' case, and after the verdict of the jury.

4. The court erred in overruling defendants-appellants' motion for a new trial.

It is well settled that the validity of a marriage must be determined from the lex loci contractus. If valid where solemnized it is valid elsewhere; if invalid there, it is invalid everywhere.

McDowell v. Sapp, 39 O. S., 558-560;
Courtright v. Courtright, 11 Decisions; Reprint, 413; affirmed, 53 O. S., 685;
Peefer v. State, 42 Ohio App., 276;
Seabold v. Seabold, 84 Ohio App., 83.

The validity of the marriage between the minor, Karlene Kay Gams, and Stanley Thorn must be determined by the laws of West Virginia where the marriage took place.

The law of West Virginia provides, for marriage, the age of consent of the male shall be eighteen years and of the female, sixteen years and that the consent of parents or guardian is necessary where the party is under twenty-one years.

In the case of Perkey v. Perkey, 87 West Virginia, 656, 106 Southeastern, 40, the Supreme Court of West Virginia states the law of West Virginia to be:

> "At common law the age of consent of the female was twelve years, that of the male fourteen years, but marriage under those ages and over seven were not regarded void, but voidable only at the will of either of the parties on arriving at the age of consent. Statutes like ours were not intended to do more than raise the ages of consent, leaving the rules of the common law in all other respects unimpaired and in full force. And so our statute provides that

> marriage contracts made under the ages of consent shall be void only from the time they are so declared by decree of divorce or a nullity."

Under the laws of West Virginia the marriage of Kay Gans and Stanley Thorn was valid, and while voidable, it was not void.

The court has found nothing in the law of Ohio, nor has any law been cited by counsel, which declare such marriages void while under the age limit fixed by statute.

As stated in Courtright v. Courtright, supra, affirmed without opinion, 53 O. S., 685,

> "In the absence therefore of a statute expressly prohibiting, and declaring a marriage contrary to such prohibition void, a marriage entered into in this state that would be good at common law, will not be declared void because not entered into in accordance with the statute of this state regulating that subject.
>
> "II. The statutes of this state provide, that a female may enter into the marriage relation upon arriving at the age of sixteen years, but do not declare that a marriage by her under that age is void.
>
> "Our statutes do not attempt, nor profess to give any extra territorial operation to their own provisions or principles, with respect to the citizens of this state. Nor do they profess to prevent or prohibit our citizens from going elsewhere to celebrate their marriages; much less is there any provision declaring any such marriage thus entered into void."

The marriage of the parties being valid and binding under both the laws of West Virginia and Ohio, did the minor entering into such a marriage constitute delinquency?

The answer must be in the negative, unless it is made so by the laws of Ohio.

A delinquent child is defined by the Ohio Revised Code, Section 2151.02, as follows:

> "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'delinquent child' includes any child:
>
> (A) who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state;
>
> (B) who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;
>
> (C) who is an habitual truant from home or school;
>
> (D) who so deports himself as to injure or endanger the morals or health of himself or others;
>
> (E) who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

It will be observed that if the marriage of the minor in the instant case can be found to be an act of delinquency it must be found in subsection (E) of the above quoted section.

> "(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

Under this section a child would be a delinquent child if she attempts to enter the marriage relation *without the consent of her parents*, legal guardian, or other legal authority.

The minor child did have the consent of her parents to enter into the marriage relation so that she did not violate this subsection and therefore by such marriage she could not be found to be a delinquent child.

The charge against the defendants is that they did act in a way tending to cause the delinquency of their minor daughter. If the act charged to have been committed by the defendants did not and could not tend to cause or lead to the delinquency of the minor, then the charge against them must fail.

The defendants could not be guilty of acts tending to contribute to her delinquency when none existed and could not result from the acts charged.

It is contended by the state that the consent given by the parents was illegal; that the only one who could give consent to such marriage was "the legal authority" which in this case means the Juvenile Court of Crawford County. The court so charged the jury and stated that the child, by entering into the marriage relation without the consent of the Juvenile Court of Crawford County became a delinquent child.

Revised Code Section 3101.01 provides.

"Persons who may contract matrimony.

Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A minor must *first* obtain the *consent of his parents*, surviving parent, *parent awarded custody by a court of competent jurisdiction*, the guardian of his person, or any one of the following who has been awarded *permanent* custody of him by a court exercising juvenile jurisdiction.

(A) An adult person,

(B) The department of public welfare or any child welfare organization certified by such department;

(C) A county department of welfare or a county child welfare board.

A minor shall not be required to obtain the consent of a parent, who resides in a foreign country, has neglected or abandoned such minor for a period of one year or longer immediately preceding his application for a marriage license, has been adjudged incompetent, is an inmate of a state mental or penal institution, has been permanently deprived of his custody by a court exercising juvenile jurisdiction, or has been deprived of his custody or control, or both, by the appointment of a guardian of the person of the minor by the probate court or by any other court of competent jurisdiction."

It appears from the evidence that both the defendants come within the first classification of persons whose consent to the marriage must be given, to-wit, they are the parents of the minor. And the father also comes within the second classification of persons whose consent must be obtained, to-wit, parent awarded custody by a court of competent jurisdiction.

It is conclusive that no one has been awarded *permanent* custody of the minor, so that the remaining portions of this section do not apply. The only conditions under which the juvenile court judge may grant consent for the minor to marry, is found in Ohio Revised Code section 3101.04. This section provides:

"(A) When the minor has no parent, guardian, or custodian whose consent is required, the judge of the juvenile court of the county in which the female resides may, upon application of both the contracting parties, an entry being made upon its journal, give

consent and approbation in the probate court for the marriage.

(B) When the condition of a minor female is such as imperatively to impel the marriage estate by reason of approaching maternity, or when an illegitimate child has been born, the matter shall be inquired into by the juvenile court. If as a result of the inquiry, one or both of the parents are made wards of the court, said court may, with the consent of said wards, their parents, if any are living, or of any guardian or custodian, give consent in the probate court. The probate court may thereupon issue a license, notwithstanding either or both the contracting parties for the marital relation are under the minimum age prescribed in section 3101.01, of the Revised Code, but such license shall not issue until section 3101.05 of the Revised Code has been complied with, and until such illegitimate child has been born, or it is found beyond doubt that it is a maternity case."

In the instant case none of the conditions set forth in the above section existed which would authorize the juvenile court to grant its consent to such marriage.

It is the conclusion of this court that the marriage of Kay Gans in West Virginia was a valid marriage and was not a delinquent act, and that by said marriage Kay Gans did not become a delinquent child under the Ohio law; that the acts charged, were committed in the State of West Virginia, and not in Crawford County, Ohio; that the complaints filed against the defendants do not set forth facts which charge an offense against the laws of the State of Ohio. Even if the complaints were sufficient in law, the record fails to show any fact adduced by the state which would support the charge against the defendants.

The court finds all the assignments of error well taken, but the view of the case we have taken and the disposition

made of it, it is unnecessary to discuss each of the specifications of error set forth in assignment of error number four.

The judgment of the juvenile court is reversed as being contrary to law, and this court coming now to render the judgment the court below should have rendered, dismisses the complaint against each of the defendants and they are discharged.

Younger and Guernsey, JJ., concur.

John D. Sears, Jr., Bucyrus, Ohio, for plaintiff-appellee.

Henkel, Ross, Sauter & Lett, Mansfield, Ohio, for defendant-appellant.

Judgment, Court of Appeals

THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
CRAWFORD COUNTY

No. 1519

STATE OF OHIO,
Plaintiff-Appellee,
vs.
KATHERINE GANS,
Defendant-Appellant.

No. 1520

STATE OF OHIO,
Plaintiff-Appellee,
vs.
CARL GANS,
Defendant-Appellant.

JOURNAL ENTRY OF REVERSAL

This cause and matter came on for hearing in this court on February 19, 1957, upon appeal on law, wherein the

State of Ohio was plaintiff-appellee and Katherine Gans and Carl Gans were the defendants-appellants, and the same was heard by said court upon assignments of error, bill of exceptions, transcript of docket and journal entries, pleadings and the file, and upon briefs with oral argument by counsel for both parties, the matter and cause was by the Court taken under advisement and the court being duly and fully advised in the premises, after careful consideration thereof, does find that by virtue thereof, that there is error in the record and in the proceedings prejudicial to the rights of the defendants-appellants, Katherine Gans and Carl Gans, and that by virtue thereof, the judgment of the Juvenile Court of Crawford County, Ohio, is reversed as being contrary to law, and this Court coming now to render the judgment the court below should have rendered, dismisses the complaint against each of the defendants and they are discharged. It is further ordered and adjudged that the costs of this court including costs of bill of exceptions, together with the costs in and of said Juvenile Court in said case be taxed to the plaintiff-appellee.

To all the foregoing ruling and judgment of reversal plaintiff-appellee by counsel excepts.

/s/ George S. Middleton
/s/ Raymond A. Younger,
/s/ J. Thomas Guernsey,
Judges of Court of Appeals.

Approved:

Henkel, Ross, Sauter and Lett,

By: Donald J. Lett,
Counsel for Defendants-Appellants.

s/ John D. Sears, Jr.,
Counsel for Plaintiff-Appellee.

Judgment, Juvenile Court of Crawford County, Ohio

IN THE JUVENILE COURT OF CRAWFORD COUNTY, OHIO

ENTRY ON VERDICT

———o———

STATE OF OHIO,

Plaintiff,

vs.

CARL GANS,

Defendant.

———o———

The Jury in the within cause received the evidence adduced by the parties, the arguments of Counsel, and the charge of the Court, and after deliberation thereon, returned the following verdict, to wit:

> "We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant, Carl Gans, Guilty of Acting in a Way Tending to Cause the Delinquency of Kay Gans, in the manner and form as she stands charged.
>
> F. E. BERNARD, Foreman."

WHEREUPON, at the request of the Counsel for the Defendant, the Court ordered that the Jury be polled, and, upon each Juror being called by name and inquired of if the verdict just read was his verdict, each for himself or herself answered, "It is."

THEREUPON, the Court accepted said verdict and ordered the bond heretofore given by the Defendant in this matter be continued and the Defendant permitted to leave the Court, on condition that the Defendant be present before the Court at a later date for sentence upon notice being given by the Court to Counsel for the Defendant of the date and time for sentence, to all of which the Defendant excepts.

.....

Judge.

Approved:

JOHN D. SEARS, JR., Prosecuting Attorney, Crawford County, Ohio.

DONALD J. LETT, Attorney for Defendant.

APPENDIX C

Extracts of Record

1. Extract from application to the Supreme Court of Ohio for rehearing.

A. "2. This court, in holding that the situs of the acts complained of is immaterial, even though executed outside of Ohio, raises a direct conflict with its previous decisions, is contrary to Article IV and the V, VI and XIV Amendments of the Constitution of the United States • • • •" (R. 245).

B. "3. The court's interpretation of the permissible scope of the original complaints herein nullify the provisions of a specific legislative enactment and is in direct conflict with this court's previous decisions" (R. 246).

C. "5. The charge of the trial court in the instant matters is clearly not consonant with the law established by this court in its opinion" (R. 246).

D. "2. The court in holding that it is immaterial that the acts complained of (and upon which the convictions rested) took place in a state other than Ohio contravenes the provisions of the Constitution of the United States referred to in the application herein, • • •" (R. 248).

E. "• • • The judgment of the instant court finds the defendant guilty of violating section 2151.02(C) and 2151.02(D) though the complaint was predicated upon section 2151.02(E), • • •" (R. 249).

F. "5. The charge of the trial court, and failure to charge, were not consonant with the law expressed by this court" (R. 250).

2. Extract from trial court's instructions to the jury.

A. "The complaint in this case is based upon several sections of the statutes of the State of Ohio. One is Section 2151.02 of the Revised Code of Ohio, defining who is to be considered a delinquent child, providing in brief, so far as it relates to this case, that a delinquent child includes any child under the age of 18 years, who attempts to enter into the marriage relation in any state without the consent of the legal authority. The other, Section 2151.41 of the Revised Code of Ohio, provides that any person who acts in a way tending to cause delinquency in a child, shall be punished as in the statutes provided" (R. 170).

B. "If you find that Kay Gans is under 18 years of age, you should next determine whether or not she is a delinquent child. If you find beyond a reasonable doubt that she did attempt to, or did, enter into the marriage relation in any state without the consent of the legal authority, which in this case means without the consent of the Juvenile Court of Crawford County, Ohio, you will have found that she is a delinquent child" (R. 171).

C. "If you find beyond a reasonable doubt that Kay Gans is a child under the age of 18 years, to wit: about eleven years of age; that she attempted to or did enter into the marriage relation in any state without the consent of the Juvenile Court of Crawford County, Ohio; and that the defendants, or either of them, consented to her securing the marriage license, or acted in a way that assisted her or enabled her to secure the marriage license and to attempt to enter into the marriage relation in any state, then you would be justified in finding the defendants, or either of them, guilty!" (R. 172).

D. "Mr. Lett: Yes, if the court please; in giving the instruction of the court the court quotes certain things from

Section 2151.02, and I ask the court to include: Any child who attempts to enter into the marital relationship in any state without the consent of her parent or legal authority.

The Court: The request will be refused" (R. 174-175).

E. "Mr. Lett: Note general exceptions to the charge as given and a specific objection to the court's charge as to the legal consent of the Crawford County Juvenile Court being required.

Mr. Lett: The defense again moves the Court that the matters requested by the defense in the way of special charges before argument be included in the court's general charge and that the court further charge so as to include any matters left out of the general charge which were included in said special requests, to be given at this point.

The Court: Refused.

Mr. Lett: Note exceptions" (R. 175).

3. "Mr. John D. Sears, Jr.: * * * I have filed this motion to amend the complaint against the defendant, Katherine Gans, and I have filed a motion of the same type against Carl Gans, asking permission in the case of Katherine Gans to substitute for the words, 'said Kathryn Gans did consent to said child securing a marriage license and misrepresenting her age' that now appear in the complaint, the following words: 'In that Katherine Gans entered into a conspiracy with Carl Gans, father of said Kay Gans, Stanley Thorn and said Kay Gans, also known as Karlene Kay Gans, to leave the territorial jurisdiction of the Juvenile Court of Crawford County, Ohio for the purpose of committing perjury in the state of West Virginia, to wit: Signing and swearing to an application for a marriage license falsely representing therein that said Karlene Kay Gans was 17 years of age, where in truth and in fact she was only 11 years of age and further to enter into a mar-

riage with said Stanley Thorn by virtue of the license thus fraudulently and falsely procured by means of said perjured statement, that said conspiracy formed within Crawford County, Ohio, was carried out, the initial steps of which carrying out were taken in Crawford County, Ohio.'

* * * *

The Court: I am inclined to overrule the motions for leave to amend the complaints. Overruled, and we will proceed under the original affidavits" (R. 40-41-42-43).